Office Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 960

CANADIAN NATIONAL RAILWAY COMPANY,

Petitioner,

—v.—

GEORGE TAYLOR.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

THE CANADIAN NATIONAL RAILWAY COMPANY HEREBY PETITIONS FOR A WRIT OF CERTIORARI TO REVIEW THE JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Opinions Below

There was no opinion rendered by the District Court. The opinion of the Court of Appeals (App. A, *infra* p. 7) is not yet reported.

Jurisdiction

The judgment of the Court of Appeals was entered on April 3, 1962 (App. B, *infra* p. 73). The jurisdiction of this Honorable Court is invoked under 28 U.S.C. 1254 (1).

Question Presented

Whether in a negligence action under 45 U.S.C. 51, a jury verdict, which the Trial Court specifically found to be excessive because the jury became "infuriated" by the conduct of certain of petitioner's employees on the witness stand, who were subpoenaed by the respondent, can be corrected by a remittitur instead of a new trial, under the Fifth and Seventh Amendments, and the decisions of this Court.

Statute and Constitutional Provisions Involved

While the action was originally brought under the Federal Employers Liability Act (45 U.S.C. 51), the present question presented is submitted under the "due process" clause of the Fifth Amendment and under the Seventh Amendment. It is felt that this Honorable Court is sufficiently familiar with those amendments to obviate the necessity of reproducing them verbatim.

The case originated by the filing of a complaint for negligence under the Federal Employers Liability Act in 1960. A jury trial was held at Brattleboro, Vermont before Honorable Ernest W. Gibson, United States District Judge for the District of Vermont, and a jury, in 1961. The jury returned a verdict for the plaintiff for $70,000 and judgment on the verdict was entered.

Petitioner made a timely motion for a new trial upon the grounds, among others, that the verdict was excessive and that it was inspired by sympathy, passion or prejudice on the part of the jury. That motion was denied upon condition that the plaintiff remit $20,000 from the verdict in which event judgment would be entered for $50,000; otherwise, the motion would be granted (App. C, *infra* p. 14).

In reaching this result, the Trial Court found that the verdict was excessive and that the conflict of certain petitioner's employees on the witness stand, which employees were subpoenaed by the respondent, "very apparently infuriated the jury and helped produce the size of the verdict the jury later rendered". Judgment was entered for the sum of $50,000 (App. D. p. 16). An appeal was taken to the United States Court of Appeals for the Second Circuit in 1961 and the case was argued in that Court on February 16, 1962.

The judgment was affirmed in the Circuit Court and that Court's opinion was filed April 3, 1962. The Circuit Court's opinion is not yet reported but is reproduced as App. A, *infra* p. 7.

The Court of Appeals for the Second Circuit, while admitting that a verdict based on appeals to jury passion and prejudice cannot stand, declined to apply that rule to a case where jury passion and prejudice results from causes other than the misconduct of counsel.

Reasons for Granting the Writ

First: The case presents an important question of the right of every litigant to a fair trial by a fair and impartial jury, guaranteed by the due process clause of the Fifth Amendment and by the Seventh Amendment. As was said in *Baker* v. *Hudspeth*, 129 Fed. (2) 779 (Cert. denied 317 U.S. 681, rehearing denied 318 U.S. 800) at page 781:

> "There is no right more sacred to our institutions of government than the right to a public trial by a fair and impartial jury; no wrong more grievous than its denial, and no greater duty is enjoined upon the courts than to preserve that right untarnished and undefiled."

And again in *U. S. v. Chapman*, 158 Fed. (2) 417 at 419:

> "Whether a juror is prejudiced or partial in the sense that one of the parties is denied a fair and impartial trial, is not a procedural matter to be determined by statutory construction. It is one of vital substantive law under the Constitution, to be resolved according to the highest standards of human conduct."

The Trial Court found the verdict excessive and found that the size of the verdict was due to the "infuriation" of the jury which resented the conduct of certain witnesses on the stand. These witnesses were employees of the petitioner but were subpoenaed and called by the respondent. Whatever misconduct those employees may have indulged, it was a matter between respondent's counsel and the men, and was in no way related to their employment with petitioner.

The Court of Appeals recognized that a verdict resulting from jury prejudice or passion cannot stand, but apparently attempted to limit the doctrine to cases where the prejudice or passion was inspired by the misconduct of counsel and not by the misconduct of witnesses.

The opinion of the Court of Appeals also suggests that the Trial Court may have been mistaken in its belief that the jury was prejudiced. We respectfully suggest that the competency of the Trial Judge to decide that question should not be questioned. The fairness of the trial is a part of his Constitutional duty. He obviously believed the trial was not an impartial one and took steps to correct the defect by remittitur. The question we raise is whether the remedy applied by the Trial Judge can cure a tainted verdict arrived at by a prejudiced jury, within Constitutional limitations.

We, respectfully suggest that the Fifth and Seventh Amendments guarantee to your petitioner the right to a trial before a jury which is not prejudiced and that under those amendments, a verdict by an admittedly biased jury must be set aside.

Second: The Court of Appeals decision is contrary to the decision of this Court in *Minneapolis, etc., Ry.*, v. *Moquin*, 283 U.S. 520, and cases approving it, *Foust* v. *Manson S.S. Lines*, 239 U.S. 77, *New York Central R.R.* v. *Johnson*, 279 U.S. 310, *Berger* v. *U. S.*, 295 U.S. 78, and *Viereck* v. *U. S.*, 318 U.S. 236. Those cases all hold that where jury passion or prejudice exist, the remedy is not remittitur, but a new trial. The Court of Appeals distinguished its decision from those cases because the jury passion and prejudice was not inspired by the conduct of counsel. We do not understand that the rule is so limited, but applies however the jury passion or prejudice may be generated.

That this Honorable Court did not so intend to limit the *Minneapolis* case (cited by the Court of Appeals) is apparent from the opinion, 283 U.S. 520 at 521-522:

> "In actions under the federal statute no verdict can be permitted to stand which is found to be in any degree the result of appeals to passion and prejudice. Obviously such means may be quite as effective to beget a wholly wrong verdict as to produce an excessive one. A litigant gaining a verdict thereby will not be permitted the benefit of calculation, which can be little better than speculation, as to the extent of the wrong inflicted upon his opponent."

The rationale of the above case is that any verdict arrived at by a prejudiced jury, no matter how that prejudice was inspired, cannot be cured by remittitur, as was there attempted, but must be set aside.

It is, therefore, respectfully submitted that the decision of the Court of Appeals is contrary to the cited cases in this Court.

Third: The decision of the Court of Appeals is in direct conflict with a decision of the Court of Appeals for the Fifth Circuit, *Brabham* v. *State of Mississippi*, 96 Fed. (2) 210, where that Court held that the anger of the jury toward one of the parties for things he had done, amounted to jury passion and prejudice requiring a new trial and not remittitur even though there was no claim of misconduct of counsel.

In the *Fifth Circuit* case, as in this case, the Trial Court found that the prejudice resulted from the resentment of the jury because of matters not connected with counsel. In the *Fifth Circuit* case, the Trial Court found that the jury became enraged by the action of one of the parties to the litigation. We respectfully suggest, therefore, that the decisions of the two Circuits are in direct conflict.

This conflict between the decisions of the Second and Fifth Circuits on an important matter involving the sanctity of jury trials justifies a review by this Honorable Court.

Conclusion

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

April 25, 1962.

H. H. Powers
Attorney for Petitioner
Railroad Terminal Building
St. Albans, Vermont

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 234—September Term, 1961.

(Argued February 16, 1962 Decided April 3, 1962.)

Docket No. 27287

GEORGE TAYLOR,

Plaintiff-Appellee,

—v.—

CANADIAN NATIONAL RAILWAY COMPANY,

Defendant-Appellant.

Before:

CLARK, SMITH and MARSHALL,

Circuit Judges.

Appeal from judgment under the Federal Employers Liability Act for plaintiff to recover of the Canadian National Railway Company $50,000 and costs. After trial to the jury in the District of Vermont, Ernest W. Gibson, *Judge*, a verdict in the amount of $70,000 was returned. A remittitur of $20,000 ordered by the court in conditionally denying motion for new trial was filed, reducing the judgment to $50,000, from which judgment defendant appeals. Affirmed.

C. O. GRANAI, Barre, Vermont, *for plaintiff-appellee.*

H. H. POWERS, St. Albans, Vermont, *for defendant-appellant.*

SMITH, *Circuit Judge*:

After trial to the jury under the Federal Employers Liability Act, 45 U. S. C. 51 et seq., in the District Court for the District of Vermont, Ernest W. Gibson, *Judge*, and the return of a $70,000 plaintiff's verdict, a motion for new trial was denied on condition of a remittitur of $20,000, which was filed, and judgment entered.

Defendant appeals on four grounds, (1) that the jury was influenced by passion and prejudice and that therefore a new trial rather than remittitur was required, (2) the refusal of a "real evidence" charge, (3) a charge on the failure to call a witness who was in court, and (4) excessiveness of the verdict as reduced by the remittitur.

We find no error and affirm the judgment as reduced by the remittitur.

Taylor, a classified laborer in the employ of defendant, was working at its Island Pond, Vermont roundhouse as a member of a three man crew replacing pipes when injured August 21, 1958. While moving a portable work platform he was struck on the forehead by a falling ball-peen hammer. Both the manner of the happening and the extent of the injuries were in dispute before the jury. Taking the version of the evidence most favorable to the plaintiff-appellee (as we must), the jury could have found that one Wing, a fellow employee, was on the top of the platform, in violation of regulations, while it was being moved, and negligently dropped or dislodged the hammer which struck and injured Taylor. This is sufficient to sustain the finding of liability.

I.

The principal attack on the judgment here is based on a statement in the order conditionally denying defendant's motion for new trial, to the effect that the conduct of some

fellow employees of the plaintiff as witnesses very apparently infuriated the jury and helped produce the size of the verdict. A verdict based on appeals to passion and prejudice cannot stand. *Minneapolis, St. Ry. v. Moquin*, 283 U. S. 520 (1931). The court, however, based its determination that the verdict was excessive on the age of the plaintiff and not on any appeals to or prejudice on the part of the jury. Indeed, had a finding of passion and prejudice been made, it would have been clearly erroneous because without support in the record here. There is here no claim that counsel in argument made any improper appeal. The surmise of the court as to the jury's feelings seems pure speculation reflecting the court's own reaction to testimony, with no basis for a conclusion that the jury felt as the judge here did. The jury may as well have dispassionately made an excessive estimate of the work expectancy of this individual plaintiff had the accident not occurred.

II.

The requested charge on "real evidence" was as follows:

"DEFENDANT'S REQUESTS TO CHARGE

"Defendant, Canadian National Railway Company, respectfully requests the Court to charge the jury as follows:

"1. The Defendant claims, among other things, that the Plaintiff was negligent in the way he handled the movable platform and that the Plaintiff's negligence was the sole proximate cause of the accident. In support of that claim, the Defendant has introduced a scale model of the movable platform and has made certain claims about the manner in which it was operated by the Plaintiff. This evidence is called real evidence which is known as evidence of physical facts.

"If you find, and the decision is yours to make, that the model which was introduced in evidence is an accurate representation of the movable platform involved in the accident, and if you find that it is properly drawn to scale, and if you find that those facts are not disputed, then you have an example of the type of evidence which we call physical facts.

"If you find the physical facts to be undisputed with respect to the construction and operation of this movable platform, that evidence takes precedence over any oral testimony which contradicts it. To state the matter differently, the physical facts, once established and not disputed, will control the evidence on the question which you find these physical facts have proved."

It was apparently requested on defendant's theory that if Taylor lifted the front legs of the platform an object on top of the platform could only slide away from him. Vermont has a rule that undisputed physical facts may control over contrary testimony. We may assume *arguendo* that the rule under this Federal Act is the same. The difficulty with the theory here is that there is no undisputed testimony that the hammer lay flat on the platform and not in Wing's hand, or balanced on the forward edge. The instruction sought, while perhaps correct in the abstract, is too general and vague to be helpful to the jury on the evidence before it in this case, and was properly refused.

III.

Defendant's Claims Agent, F. W. Smith, had taken statements of plaintiff, repudiated in some respects by plaintiff on the stand. In its instructions on credibility, the court referred to the fact that Smith, although present in court,

had not been called to the stand. The charge was plainly correct. Plaintiff's credibility was under attack because of differences between his testimony on the stand and earlier statements purportedly taken down by Smith. Plaintiff testified that some of the material in the statements had been added after he had signed them. Smith, defendant's employee, was in the usual meaning of the term, a witness in defendant's control, and was available to contradict plaintiff. Whether any matter had been added was peculiarly in Smith's knowledge. An inference favorable to Taylor's credibility was permissible from defendant's failure to call Smith to the stand. *State of Vermont* v. *Levine*, 117 Vt. 320, 326. 2 Wigmore, Evidence, 285-290 (3rd ed. 1940).

IV.

We turn to the review of the amount of the award, which appellant claims is still so excessive as to require reversal. Assuming *arguendo* that the question is reviewable, compare *Daguello* v. *Long Island RR Co.*, 289 F. 2d 797 (2 Cir. 1961) with *Maher* v. *Isthmian Steamship Co.*, 253 F. 2d 414 (2 Cir. 1958), we do not think the award so "monstrous," *Affolder* v. *New York C & St L. RR Co.*, 339 U. S. 96, 101 (1950), as to amount to an abuse of discretion. Plaintiff was 62 at the time of the accident. The jury could have found that he suffered a fracture of the skull and some neurological damage, involving a lessening of function of his olfactory senses and recurrent severe headaches, with permanent inability to perform heavy labor. Medical bills were approximately $1150. Taylor's average earnings were some four thousand dollars a year. The life expectancy of a man his age at the time of the injury was approximately 13 years. He had enjoyed good health up to the time of the injury. At the argument on the motion for new trial counsel for defendant placed the out-

side limits of economic loss at about $33,150. On this calculation, there would remain after the remittitur an approximate additional award for pain and suffering and physical impairment of $16,850. This is not so great as to exceed a fair recovery for the injuries suffered, let alone so high as to shock the conscience of the court. Compare *Dagnello v. Long Island RR Co., supra, Dellaripa v. N. Y., N. H. & H. RR Co.*, 257 F. 2d 733 (2 Cir. 1958).

The judgment is affirmed.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the third day of April, one thousand nine hundred and sixty-two.

Present:

HON. CHARLES E. CLARK,
HON. J. JOSEPH SMITH,
HON. THURGOOD MARSHALL,

Circuit Judges.

GEORGE TAYLOR,

Plaintiff-Appellee,

—v.—

CANADIAN NATIONAL RAILWAY COMPANY,

Defendant-Appellant.

Appeal from the United States District Court for the District of Vermont.

This cause came on to be heard on the transcript of record from the United States District Court for the District of Vermont, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO
Clerk

APPENDIX C

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF VERMONT

Civil Number 3100

GEORGE TAYLOR,

Plaintiff,

against

CANADIAN NATIONAL RAILWAY COMPANY,

Defendant.

ORDER DENYING DEFENDANT'S MOTION FOR NEW TRIAL UPON THE CONDITION THAT THE PLAINTIFF REMIT A CERTAIN SUM FROM THE VERDICT

This case was tried at Brattleboro, Vermont, on May 31 through June 2, 1961. The jury rendered a verdict for the plaintiff in the amount of $70,000. The defendant's motion for a new trial was filed on June 8, 1961. On June 12, 1961, this Court entered judgment on the verdict of the jury.

It is quite evident from listening to the testimony of certain fellow employee witnesses that their conduct on the witness-stand, under oath, greatly affected the verdict returned by the jury. These three witnesses were employed by the defendant at Island Pond, Vermont. They completely changed their accounts of how the accident occurred after initially consenting to testify on behalf of the plaintiff. During the investigation of the case by the plaintiff's attorney, they all agreed to go from Island Pond to Brattleboro, the place of trial—some 175 miles—and testify for Mr. Taylor, and gave to the plaintiff's attorney detailed accounts of their respective observations. However, the

day before the trial was to begin, they notified the plaintiff's attorney that they would be unable to be present at the trial. Consequently, it was necessary for the plaintiff to subpoena them. Moreover, at the trial, they related nearly completely different stories from those they had told when speaking with the plaintiff's attorney in Island Pond. This conduct, their evasiveness on the witness stand and the obviousness of their changing of their accounts of what took place, very apparently infuriated the jury and helped produce the size of the verdict the jury later rendered.

Furthermore, the actions of these witnesses were so apparent that this Court has instructed the U. S. Attorney for the District of Vermont to investigate this matter to determine if possible who caused an apparent tampering with these witnesses.

The Court feels that there is no question but that the defendant was liable in this action, and that the plaintiff suffered substantial injury, but, because of the age of the plaintiff, this verdict was somewhat excessive and that the plaintiff should remit part of the verdict.

It is hereby Ordered that the defendant's motion for a new trial is denied upon the condition that the plaintiff remit $20,000 from the verdict. If the plaintiff remits this amount within 10 days from this date, then judgment will be entered for the plaintiff for $50,000 plus costs. Otherwise a new trial will be granted to the defendant.

ERNEST W. GIBSON
United States District Judge

Dated at Brattleboro, District of Vermont this 11th day of August, 1961.

Endorsed: Filed August 12, 1961

ARNOLD A. MURRAY,
Clerk.

APPENDIX D

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF VERMONT

Civil Number 3100

GEORGE TAYLOR,

Plaintiff,

—against—

CANADIAN NATIONAL RAILWAY COMPANY,

Defendant.

Judgment for the Plaintiff

The plaintiff having filed a Remittitur on the 16th of August, 1961 in accordance with the Court's Order of August 14, 1961, judgment is hereby entered for the plaintiff to recover from the defendant the sum of Fifty Thousand Dollars ($50,000.00) damages with costs.

The judgment is effective as of the filing of the Plaintiff's Remittitur, August 16, 1961.

Done at Brattleboro, District of Vermont, this 24th day of August, 1961.

ERNEST W. GIBSON
United States District Judge

Endorsed: Filed August 25, 1961

EDWARD J. TRUDELL
Deputy Clerk